1980

Mark Robert Gilleland v. Sandwich World, Inc. , A Corporation; and George Jacobs, An Individual : Brief of Respondant, Mark Robert Gilliland

Utah Supreme Court

DARREIL G. RENSTROM; Attorney for Respondent Mark Robert Gilleland Kent_B. Scott, Richard J. Lawrence, Michail L. Hutchings; Attorneys for Appellant, George Jacobs

IN THE SUPREME COURT

OF THE STATE OF UTAH

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MARK ROBERT GILLELAND	:	
Plaintiff-Respondent,	:	
vs.	:	Case No. 16888
SANDWICH WORLD, INC., a corporation; and GEORGE JACOBS, an individual,	:	
Defendant-Appellant.	:	

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BRIEF OF RESPONDANT, MARK ROBERT GILLELAND

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Appeal from Judgment
Of the Second Judicial District Court
for Weber County, Utah
Hon. John F. Wahlquist, Judge

DARRELL G. RENSTROM, Esq.
2640 Washington Blvd.
Ogden, Utah 84401

Attorney for Respondent
Mark Robert Gilleland

Kent B. Scott
Richard J. Lawrence
Michail L. Hutchings
SENIOR & SENIOR
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, UT 84111

Attorneys for Appellant,
George Jacobs

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SENIOR & SENIOR
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, UT 84111

Attorneys for Appellant,
George Jacobs

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I.

NATURE OF CASE

The Plaintiff-Respondant, Mark Robert Gilleland in a civil action seeks to recover a judgment from the defendants for willful breach of contract and deliberate scuddling of a corporation to avoid payment of said contract.

II.

DISPOSITION IN LOWER COURT

This district Court of Weber County granted to the Plaintiff a default judgment against the defendants on August 29, 1979, after both defendants failed to file responsive pleadings in time as allowed by law.

That after said default judgment was entered, nothing occured until the defendant, George Jacobs, was served with a Supplimental Order on October, 15, 1979, after which on October 16, 1979, 49 days after judgment was entered, a Motion to Vacate was made.

On October 29, Defendant-Appellant's Motion to Vacate was argued and on November 20, 1979, in a written opinion said motion was denied.

On december 4, 1979, a Motion for a Rehearing was made and argues on December 31, 1979. On January 8, 1980, said motion was again denied in a written opinion.

III.

RELIEF SOUGHT ON APPEAL

The Plaintiff-Respondant respectfully seeks that the lower court be upheld and Defendant, George Jacobs' appeal be denied, with costs to the Plaintiff-Appellant.

IV.

STATEMENT OF FACTS

That on March 12, 1979, Plaintiff-Respondants attorney addressed a letter to Mr. George Jacobs, President of Sandwich World, Inc., sole owner of the same making a demand on said corporation for the balance due and owing the Plaintiff on a written contract entered into on the 2nd day of September 1977.

That on March 22, 1979, a letter signed by George Jacobs, as President of Sandwich World, Inc., was sent to and received by Plaintiff-Respondant's attorney, wherein it indicated that Sandwich World was denying the requests and allegations contained in the previous letter.

On April 11, 1979, the State of Utah served Garnishment Interrogatories on Sandwich World, Inc., and the said George Jacobs signed under oath an acknowledgment that Sandwich World did in fact owe Mr. Gilleland substantial sums of money.

On approximately May 1, 1979, Plaintiff-Respondant's attorney personally telephoned Mr. George Jacobs and advised him of the claim and the inconsistant positions of his letter dated March 22, 1979, and his sworn statement dated April 11, 1979, at which time he became extremely hostile and stated as follows:

"If Mr. Gilleland or you attempt to collect this money, I will personally see that it is not collected by sinking corporation so that nobody will get anything."

On May 15, 1979, the Plaintiff, by and through his attorney, Darrell G. Renstrom, filed suit against Sandwich World, Inc.

On May 28, 1979 Sandwich World, Inc., was served.

On June 27, 1979, an Amended Complaint was filed by the Plaintiff, suing both Sandwich World, Inc., and George Jacobs, as an individual.

On July 3, 1979, the Salt Lake County Sheriff's Office made a return of service indicating that the Defendants could not be served because they had moved out and left no forwarding address.

On August 7, 1979, both the Defendant, Sandwich World, Inc., and George Jacobs were served by the Salt Lake County Sheriff's Office.

On August 27, 1979, the time within which to answer said Complaint expired.

On August 29, 1979, the Plaintiff took a default judgment against both Defendants.

On August 29, 1979, Plaintiff-Respondant upon returning to his office after taking a default judgment, had a note indicating that Richard J. Lawrence of Salt Lake City had called him, and an attempt was made by Plaintiff-Respondant's attorney to return the call. However, Mr. Lawrence was not available to take the call.

On approximately September 4, 1979, Plaintiff-Respondant's Attorney received a call from attorney Richard J. Lawrence indicating that he represented the Defendant, George Jacobs and wanted additional time in which to answer said Complaint. At this time, he was advised that a default had already been taken and while Plaintiff-Respondant's attorney would like to accommodate him, he could not do so because of the misrepresentations and obstreperous conduct of his client.

On October 16, 1979, some 49 days after the default was taken, counsel for the Defendant, George Jacobs, sought to have the judgment vacated.

The District Court made the following Findings of Fact and reached the following Conclusions of Law in the said matter on the 20th day of

November 1979, in response to a Motion to Vacate the Judgment by the Defendant-Appellant:

FINDINGS OF FACT

1. The file discloses that on May 17th, 1979, plaintiff filed a complaint aganist the defendant Sandwich World, Inc., but not Jacobs as an individual.

2. This complaint was served on the 18th day of May, 1979, on Sandwich World, Inc., by leaving it with George Jacobs, President.

3. On June 28, 1979, plaintiff filed an amended complaint that sued both Sandwich World, Inc., and George Jacobs as an individual. This summons was served on the 7th day of August, 1979, and did recite that it was served together with a copy of the complaint. However, there is no issue that what was actually served was the Amended Complaint, by the Sheriff of Salt Lake County. All of these instruments were duly filed with the Court.

4. On August 29, 1979 the plaintiff moved for and was granted a default judgment for failure of defendants to answer or submit evidence. The actual judgment per se was signed by the Court on August 29, 1979, but findings of fact were not formally submitted at that time; but the Judgment was submitted and signed. Plaintiff's attorney was informed that eventually findings of fact would have to be submitted.

5. Nothing further appears of record until October 11, 1979, when the Court received a copy of a Motion to Vacate the Judgment and Dismiss Complaint. This was accompanied by a memorandum in support of it. The certificate of mailing indicates that it was mailed on the 10th day of October, and presumably would be received approximately when the original was received by the Court on October 11th.

6. There was enclosed an affidavit of Mr. Jacobs, in which he alleges that he was too busy to contact an attorney until near the last date, and that when he contacted an attorney, the attorney informed him he was not prepared to have a conference at that time, and would request a continuance.

7. There is an affidavit from the attorney, indicating that he did receive that contact from his client when there was still approximately two days to go on the time allowed for answer to the Amended Complaint. The attorney's affidavit also alleges that he make a phone call to Darrell Renstrom's office, the plaintiff's attorney; but did not reach Darrell Renstrom in any way or contact him by phone.

8. Darrell Renstrom indicated that he attempted to return the call to the attorney for defendant, but did not know what the call was about.

9. On the afternoon after the default had been heard, there was a telephone conversation bewteen the two attorneys involved, in which defendants' attorney requested plaintiff's attorney to set aside his default judgment. Plaintiff's attorney refused to do so, on the basis that he had been informed by the defendant personally that he (the defendant) would do everything in his power to stall and make it impossible for the plaintiff ever to collect anything.

10. There was no motion made for a new trial within the statutory period.

11. There was no effort made toward an appeal in any form during the statutory period.

12. On October 11, 1979, the Court received and filed the Motion to dismiss the complaint, and also for the setting aside of the default so that the matter could proceed upon it merits. The Court notes that this action may well have been prompted by the filing of supplementary proceedings, signed on October 4, 1979, by Judge Calvin Gould of this District. This supplemental proceeding had been served on the 10th day of October 1979, which would be the day before the Motion to Set Aside the Judgment was filed.

13. There has been a hearing on the supplemental order. At this hearing, the motion to set aside the default was heard, and also the motion to dismiss for lack of jurisdiction was heard. Plaintiff's attorney has submitted a later affidavit, but the Court deems it is immaterial.

14. Insofar as it is material to these motions, the defendant's testimony under oath in the supplementary proceedings is as follows: Defendant testified that at the time in question he was a resident of the State of Utah, and was conducting this business within the State of Utah, that is, Sandwich World, Inc. He also testified that he was the president of the corporation, the only stockholder with the exception of his wife, and the only known official with the exception of his wife, and that there were never any stockholders' meetings as such, but just conferences between him and his wife,. He testified that he had been ordered to bring with him the records of Sandwich World, Inc,. so that they could be explored at this hearing, but indicated that he did not know for sure where the records were, but thought that he possibly could find them, but had not made any real serious effort to do so, except maybe to inquire of one person if he had the records, and that person indicated he "would look." He also indicated the records may well be with some accountant who had not been paid, and that he had made absolutely no contact with the accountant in any way. The defendant Jacobs also testified that he had been a resident throughout all of the proceedings, and that he did send the correspondence which introduced into evidence, in the form of letters

15. The defendant Jacobs further testified that he may have totally abandoned all of the records, and that he left them with

another person so that person could possibly get some money out of the corporation, but he is not sure that this is true. He did not bring the bankbooks, and claims that they are at a place unknown to him.

16. The Court finds it to be a fact that the defendant has made absolutely no effort to appear at the supplemental proceedings in an informed position at all. Defendant's testimony does not disclose where he was, or why he was out of town, or why it was that he could not contact an attorney earlier than he did. He has testified that he is now employed as a salesman, earning about $500.00 a week, but does not give any details or in any way specify why he cannot or did not take care of the supplemental proceeding or the complaint before.

17. There is no justification in record at all for why there was no moition made for a new trial. There is no justification in the record at all for why there was not an appeal filed, if defendant felt that the judgment which had been rendered was improper

18. The Court did require formal findings of fact to be prepared even though this had been a default matter, and that if there was any appeal they could be seen. There is no evidence or justification in the record at all as to why the motion to set aside the judgment was not filed earlier, except that these may have been just continuous delays until the supplemental proceeding was filed.

CONCLUSIONS OF LAW

1. The motion to dismiss for lack of jurisdiction is denied. It appears from all the evidence before the Court that defendant was in fact a resident of the State of Utah at the time of service of summons and the Amended Complaint upon him, and that he was responsible to the jurisdiction of the court. Whether or not the motion might have been made at that time to change the venue is immaterial at this time, and the Court has not explored as to whether or not the plaintiff had a justification for holding it in Weber County. But the mere fact that there may or may not have been grounds for change of venue does not deprive the Court of jurisdiction in any way.

2. The Court finds that there is no excusable neglect on the part of the defendant in preparing for either the supplementary proceedings which has taken place before the Court, or any justification for failing to answer to the complaint within a reasonable time, or to make a motion for a new trial, or to file an appeal, wit in the specified period. The Court concludes that there is a defini program designed to stall collection efforts, and that this is in fa the defendant Jacobs' goal, and in fact proved by circumstantial evidence beyond any reasonable doubt to be his intent. The service of summons made by the Sheriff with the Amended Complaint did recite "the attached complain," whereas actually what was attached was a document called the "Amended Complaint;" however, there is no evidence that the defendant was [illegible] of th slight irregularity.

3. The Court denies the motion to dismiss for lack of jurisdiction.

4. The Court denies the motion to set aside the default.

5. The Court denies the motion to set aside the default judgment.

That the District Court made the additional Findings of Fact and readched the following Conclusions of Law on January 8, 1980, in denying the Defendant-Appellant's motion for a rehearing to vacate said judgment as follows:

FINDINGS OF FACT

1. There is no suggestion in any of the affidavits or evidence that the corporation defendant has any defense against plaintiff's cause of action praying for the return of the moneys.

2. The affidavits, evidence, and arguments of the attorneys suggest only one defense on behalf of the individual defendant. That defense is that the defendant acted only as an agent for the corporation, and is not individually liable, and further, that the defendant has taken no action that would justify the setting aside of the corporation shield.

3. Before this lawsuit was filed, plaintiff's attorney contacted the individual defendant and informed him of an intent to sue if the moneys were not returned. The individual defendant informed plaintiff's attorney that if such a suit were filed, the individual defendant would see to it that the lawsuit was frustrated, and that no recovery would be had.

4. The plaintiff's attorney indicated an intent to go forward with the lawsuit without any further delay.

5. The plaintiff's attorney then filed the lawsuit on behalf of his client, and has at no time ever consented to any type of delay.

6. The individual defendant does in fact have an intent to frustrate the plaintiff's efforts to bring the matter to an immediate conclusion. He has acted in pursuit of that intent throughout this proceeding.

7. After the plaintiff's action was filed, but before expiration of the 20-day period, the defendants' attorney did call plaintiff's attorney's office and leave a message for plaintiff's attorney to return the call to him in Salt Lake City. There was no information given that reached the plaintiff's attorney indicating why the attorney wished the return call, or even who the attorney indicating

why the attorney wished the return call, or even who the attorney represented. The plaintiff's attorney offices in Ogden, Utah, and he placed the return call "collect" to the defense attorney. The defens attorney refused the call. There was no further contact between the attorneys until after the default was taken. On the day the plainfif attorney appeared in court and took default against both defendants, and had returned to his office, the defense attorney telephoned the plaintiff's attorney to request a delay. Plaintiffs' attorney immediately informed the defense attorney that the default had been entered, and that he would not cooperate in any way with setting aside the default. The plaintiff's attorney indicatied an intent to go forward with his judgment.

8. The defense did not file any motion under the provisions for a new trial. The defense took no action at all until there was served a "supplemental proceeding" on the individual defendant to advance collection on the judgment against both the corporation and himself.

9. Immediately on the time for the scheduled supplemental proce ing, the individual defendant filed a motion to delay the supplementa proceeding, and a further motion to set aside the default on the grou of excusable neglect.

10. The Court ordered the supplemental proceeding to go forward, but took under advisement the motion to set aside the default, as the default concerned the individual defendant. There has never been filed, to the Court's knowledge, a motion to set aside this default judgment as it affects the corporate defendant.

11. Throughout the supplemental proceedings, there has been deba and evidence received, in support of the respective contentions of ea side on the motion to set aside the default judgment against the individual defendant. The Court makes the following findings of fact growing out of those hearings:

A. The defendant intended to file an answer setting forth the defense that he acted only as an agent of the corporation and further, that there was no reason to remove the agent's corporation shield.

B. This was the defendant's intention when he received the omplaint, and his intention when he first contacted his attorney, and remains his intention.

C. An answer could have been filed in a timely fashion in this lawsuit, after no more than 30 minutes preparation time.

D. The answer was not filed within the 20 days allowed.

E. There was an effort made by the defendant's attorney to caus it to appear that there was some justification for failure t file a timely answer, wehreas none in fact exists.

F. The individual defendant's actions throughout the supplement proceedings have been de[illegible] intiff's efforts to collect the j[illegible] ion

defendant and against the individual defendant himself. This action has been a refusal to bring to court in a timely fashion materials subpoenaed, failure to answer questions that would normally be answerable by an informed corporation official, and a failure to timely disclose where such records were kept.

12. The Court can find no convincing evidence in this case of any excusable neglect.

13. The Court finds in this case a deliberate intent to cause "muddy water" to appear so that the proceedings would be delayed beyond the time set forth under the rules and statutes.

CONCLUSIONS OF LAW

1. The default judgment was entered on proper evidence, after the time to answer had expired.

2. There was no excusable neglect.

3. The failure to answer was deliberate, in an attempt to frustrate the proceedings.

4. There is no equitable reason why this judgment should be set aside under the circumstances here present.

5. The Court denies all motions to set aside the default judgment.

V
RESPONSE

While the Courts of this state do not favor Judgments or default, neither do they favor inexcusable neglect on the part of a litigant to file timely pleadings nor do they favor the Courts being used for a delaying tactic to avoid honest obligations.

In Downey State Bank v Major Blackeney Corporation 545 Pacific 2nd 507 the Court said the following:

> "The party who seeks to have a default judgment set aside, must proffer some defense of at least sufficient astensible merit to justify a trial on that issue."

Also in the case of Weating house Electrical Supply Co v Paul W. Larsen Contractor Inc., 544 Pacific 2nd 876 the court said:

> "Where any reasonable excuse is offered by defaulting [illegible] Courts generally tend to favor granting relief from a default judgment, unless to do so would result

in substantial prejudice to the adverse party"

In the present case the defendant after being served with a summon and complaint did nothing untill nearly two-thirds of his 20-day period had expired, (no excuse offered.) He then after 13 days took it to his attorney who did nothing untill two days after the expiration of the 20-day period and that was only an attempt to reach plaintiff-Respondants attorney by telephone.

About September 4, 1979, six days later, Defendants-Appellant's Attorney did reach plainfiff-Respondants attorney by telephone to request additional time, but was informed that the default had been taken on August 29, 1979, two days after the normal 20-day period. Defendant-Appellant's attorney again does nothing until 49 days later and only after his client has been served with Supplemental Proceedings.

Counsel for Dependant-appellant claims he had called opposing counsel several times and left several messages. This is denied, however, when plaintiff-Respondents' attorney did return a call on August 29, 1979, he did it at his own expense and the call was not accepted as Mr. Lawrence was too busy to take the call. Mr. Lawrence offers the excuse that he was trying to reach Mr. Renstrom to obtain an extension of time, but what excuse is offered for the 49 days which expired after the judgment was entered. He offers nothing. His argument that opposing counsel's secretary may have not relayed messages accurately, is supposition on his part and it could just as easily be argued because of the evident neglect, no such calls were ever made until August 29, 1979, after default judgment had been entered.

This Court held in Cutler v Haycock 32 U. 354, 90 P. 897 the following.:

"Generally, courts were inclined to grant relief from default and bring about judgment on merits, unless default was result of inexcusable neglect of party in default, or it would be inequitable to set it aside."

The definition of excusable neglect is well stated in Crossan v. Irrigation Dev. Corp., Wyo., 598P. 2d 812, as follows:

"Excusable neglect, as basis for late appeal, is measured on a strict standard to take care of genuine emergency conditions, such as death, sickness, undue delay in the mails and other situations where such behavior might be the act of a reasonably prudent person under the circumstances. Rules of Appellate Procedure, rule 2.01."

Also, Holton v. Holton, 121 Utah 451, 243 P. 2d 438, and Nunley v. Stan Katz Real Estate, Inc., 15 Utah 2d 126:

"Although the New Rules of Civil Procedure were intended to provide liberality in procedure, it is nevertheless expected that they will be followed, and unless reasons satisfactory to the court are advanced as a basis for relief from complying with them, parties will not be excused from so doing."

No excusable neglect is advanced by the Defendant-appellant other than , "we didn't get around to it on time and assumed we could get an extension", and this is not consistent with the standard set in the for going case.

Even after judgment by default the Defendant-appellant could have sought a new trial within the ten day rule. That dead line was ignored. He could have appealed. He chose to ignore that.

The earliest holdings of this Court have given the trial Courts sound discretion as ruled in Nouinnan v. Topance 1 U. 168

"While granting or refusing applications to open and set aside defaults was addressed to Court's sound discretion, that power was to be exercised freely and liberally."

This Court further said: in the previously cited Cutler v. Haycock case the following:

> "Discretion of trial court in vacating default judgment was to be applied to facts as they appeared in each case, and, in exercise of this discretion, aim and object should be promotion and futherance of justice and protection of rights of all concerned."

and further held in Aaron v. Holmes the following 35 U. 49. 99 P 450

> "Whether default and judgment should be set aside, and party aggrieved given opportunity to plead to merits, was within sound discretion of trial court; unless it was made to appear that discretion had been abused, rulings of trial court would not be disturbed on appeal."

The question is, has the Court abused its discretion in the prese case? A Reading of the transcript of the Supplemental Hearings reve the following: (See Transcript on File herein.)

A. The Defendant-appellant was president of Sandwich World Inc,. (Page 3 line 2)

B. That Defendant-appellant abandoned the corporation. (page 3 lines 5-10)

C. The corporation did not take out Bankruptcy. (page 3 lines 1

D. No effort was made by the Defendant-appellant to dissolve the corporation. (page 3 lines 24 thru 26)

E. The Defendant-appellant gave no location as to where he cou be found after a letter of abandonement was sent. (page 4 lines 13 thru 30 and page 5 1 thru 13.)

F. The Defendant-appellant was the sole and only owner of Sandwich World. (page 5 lines 24 thru 30 and page 6 lines 1 and 2.)

G. That the Defendant-appellant did not know or care where corporate records were and defied the order of the Court to produce them. (pages 6,7,8 and 9.)

H. That the Defendant-appellant paid himself a large salary. (page 13 lines 3 thru 18 .)

I. That the Defendant-appellant made in consistent statements under oath. (page 14 lines 19 thru 30 page 15 1 thru 8.)

J. The Bank account of the Corporation was available to Defendant-appellant's wife. (page 16 lines 4 thru 6.)

K. The Defendant-appellant could not even identify who the corporate officers were even though he was president. (page 17 line 3thru 30.)

L. The Defendant-appellant was the corporate alter ego. (page 18 lines 10 thru 22.)

M. Defendant-appellant's wife made draws on the Corporation Bank account. (page 19 lines 21 thru 29.)

It is clear from the record that the Defendant-appellant had every intent to use the corporation for his own purposes and abandon the same when expedient.

CONCLUSION

The trial Court had the advantage of observing the Defendant-appellant under oath at the time of the Supplemental Hearing and could only conclude as it did that the Dependant-appellant was using the Courts as an effort to buy time against the legitimate claim of the plaintiff-Respondant and had in fact abused the authority he had as corporate president and sole owner of the same and deliberately allowed the Corporation to fold after he drained all the assetes from the same.

That Defendant-appellant made no showing of excusable neglect for failing to file his pleadings nor has his attorney.

That Defendant-appellant and his attorney knowing full well that time was of the essence made no effort to file any papers with the Court until the same was served with a Supplemental order.

That what they failed to do with the trial Court, they have succeeded in doing with this appeal as spurious as it is.

Wherefore it is respectfully urged that the District Court be upheld.

Respectfully submitted this 29th day of May 1980.

Darrell G. Renstrom
Attorney for
Mark Robert-Gilleland
Plaintiff-Respondant

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MAILING CERTIFICATE

I hereby certify that a true copy of the foregoing Brief of Appellant was mailed, this 29th day of May, 1980, to:

Kent B. Scott
Richard J. Lawrence
Michael L. Hutchings
SENIOR & SENIOR
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Ut. 84111

Attorneys for Appellant,
George Jacobs

Darrell G. Renstrom
Attorney for
Mark Robert-Gilleland
Plaintiff-Respondant